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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

SECURITIES INDUSTRY ASSOCIATION,  
*Petitioner,*

v.

BOARD OF GOVERNORS OF THE FEDERAL  
RESERVE SYSTEM, *et al.*, and  
BANKERS TRUST COMPANY,  
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT  
BANKERS TRUST COMPANY

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## **QUESTION PRESENTED**

Should judicial deference be accorded to a determination of the Board of Governors of the Federal Reserve System that Bankers Trust Company may, consistent with the Glass-Steagall Act, act as commercial paper placement agent for the bank's customers?

The United States Court of Appeals for the District of Columbia Circuit answered this question in the affirmative, concluding that the Board had "comprehensively addressed the language, history and purposes of the Act" and that the Board's determination was "reasonable."

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF IN OPPOSITION FOR RESPONDENT  
BANKERS TRUST COMPANY**

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Respondent Bankers Trust Company ("Bankers Trust")<sup>1</sup> respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. That decision is reported at 807 F.2d 1052 (1986) (Pet. App. 1a).<sup>2</sup>

**STATEMENT OF THE CASE**

In the first half of this century the market for commercial paper was small and undeveloped. In the 1960's, however, when

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<sup>1</sup> A list of the parent corporations, subsidiaries and affiliates of respondent Bankers Trust, as required by rule 28.1 of the Rules of the Supreme Court, is attached as an Appendix.

<sup>2</sup> References to the Petition for Writ of Certiorari, to the Appendix to the Petition, and to the Joint Appendix in the court below are cited herein as "Pet.," "Pet. App.," and "J.A.," respectively.

regulatory restrictions left commercial banks such as Bankers Trust with insufficient funds for lending, many corporations turned to the commercial paper market to meet their short-term credit needs. Having learned to raise funds quickly and less expensively by issuing commercial paper, corporations turned away from banks as sources of short-term credit. The result was rapid growth in the commercial paper market and a significant decrease in the role of commercial banks in short-term corporate funding. Outstanding commercial paper rose from approximately \$15 billion in 1966 to approximately \$300 billion by 1986, a 20-fold increase in 20 years. J.A. 112, 361. Outstanding commercial and industrial loans, by contrast, rose from \$82 billion in 1969 to \$251 billion in December 1984, a mere three-fold increase. J.A. 112.<sup>3</sup> The issuance of commercial paper has thus become the predominant means by which large corporations raise funds for current business operations.

In response to these market forces and in an effort to retain its prime customers, Bankers Trust in 1978 began to place commercial paper issued by its corporate customers with selected institutional purchasers. Almost immediately, petitioner Securities Industry Association ("SIA"), a handful of whose members dominate the business of underwriting third-party commercial paper, sought through litigation to end the competitive threat posed by Bankers Trust's commercial paper placement service.<sup>4</sup>

The Board of Governors of the Federal Reserve System (the "Board") initially approved Bankers Trust's commercial paper activity, reasoning that since commercial paper is the functional equivalent of a short-term loan it should not be treated as a "security" for Glass-Steagall Act purposes. The United States

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<sup>3</sup> Recent figures show that outstanding commercial paper reached \$322 billion by the end of 1986. See 73 Fed. Reserve Bull. A23 (Apr. 1987).

<sup>4</sup> SIA's suit, *Securities Indus. Ass'n v. Board of Governors*, No. 80-2730 (D.D.C. filed Oct. 24, 1980), followed nearly two years of pre-litigation efforts by SIA to compel the Board to bar Bankers Trust from offering its commercial paper placement service. SIA's 1980 suit was paralleled by a suit brought by A.G. Becker, then a major commercial paper dealer. *A.G. Becker, Inc. v. Board of Governors*, No. 80-2614 (D.D.C. filed Oct. 14, 1980). The district court consolidated the two cases, Order of Consolidation (Feb. 6, 1981), and later dismissed the *A.G. Becker* suit as duplicative, Stipulation and Order of Dismissal Without Prejudice (June 28, 1985).

District Court for the District of Columbia disagreed with the Board on that issue, *A.G. Becker, Inc. v. Board of Governors*, 519 F. Supp. 602 (1981) (Joyce Hens Green, J.) (Pet. App. 202a), but a divided panel of the court of appeals shared the Board's view and reversed, 693 F.2d 136 (1982) (Pet. App. 163a). On June 28, 1984 this Court reversed and held, in a 6-3 decision, that commercial paper is indeed a "security" for Glass-Steagall Act purposes. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137 (1984) ("*Becker*") (Pet. App. 117a).

The Court in *Becker* did not address the question of whether Bankers Trust's commercial paper placement activity constituted "underwriting" prohibited by Section 16 or "selling," "underwriting," or "distributing" prohibited by Section 21 of the Glass-Steagall Act, but said "[w]e express no opinion on these matters, leaving them to be decided on remand." 468 U.S. at 160 n.12. (Pet. App. 140a).

On remand, the Board reopened the record to obtain current information from Bankers Trust about its commercial paper placement service, and to receive comments from SIA and from many other interested parties, including the Comptroller of the Currency.<sup>5</sup>

SIA did not request a hearing before the Board to raise factual issues as to the manner in which Bankers Trust conducts its commercial paper placement service, and had no basis in the courts below to challenge the factual findings upon which the Board determined that Bankers Trust's service, as described by the Board, does not violate the Glass-Steagall Act.

On the record before it the Board described Bankers Trust's current (*i.e.*, post-*Becker*) method of conducting its commercial paper placement service as follows:

Bankers Trust's current method of placing commercial paper differs significantly from its prior method. As before,

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<sup>5</sup> The Comptroller of the Currency's submission to the Board endorsed the view, later taken by the Board, that Bankers Trust's commercial paper activity does not violate Sections 16 and 21 of the Glass-Steagall Act. J.A. 140. That position was supported in the court of appeals by the Department of Justice and the Department of the Treasury. See Brief for Appellant Board of Governors, *Securities Indus. Ass'n v. Board of Governors*, 807 F.2d 1052 (D.C. Cir. 1986) (No. 86-5089).

the bank acts as agent and adviser in assisting issuers to place their commercial paper with a limited number of institutions, such as banks, insurance companies, mutual funds, and nonfinancial businesses. Bankers Trust advises its client commercial paper issuers with respect to the rates and maturities of a proposed commercial paper issue that are likely to be accepted in the market. If the client wishes to issue commercial paper, Bankers Trust solicits potential institutional purchasers and, acting as the agent of the issuer, places the paper with the purchasers.

However, Bankers Trust has discontinued its prior practice of lending short-term funds to issuers of paper the bank places, at or near the rate of interest of the commercial paper being placed, taking back a commercial paper note. Neither Bankers Trust nor any affiliated company purchases or repurchases commercial paper placed by the bank. The bank does not inventory commercial paper overnight, takes no ownership interest in the paper being placed, and, contrary to its prior practice, does not make loans on the paper it places or otherwise take the paper as collateral for loans. Bankers Trust enters into no repurchase agreement, endorsement, or other guarantee arrangement with the purchasers of commercial paper placed by the bank.

Bankers Trust places commercial paper only with a limited number of institutions; the bank does not place any paper with individuals. The bank states that it makes no general solicitation or advertisement to the public with respect to specific issues of commercial paper, and paper placed by the bank is not purchased by the general public.<sup>6</sup>

After analyzing the entire record in light of the statutory framework and the legislative history and purposes of the Glass-Steagall Act, the Board determined in a 49-page statement ("the Board Statement") that "Bankers Trust's placement of commercial paper as described in this Statement does not constitute the 'selling,' 'underwriting' or 'distributing' of commercial paper securities for purposes of the Act." Board Statement at

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<sup>6</sup> Federal Reserve System, Statement Concerning Applicability of the Glass-Steagall Act to the Commercial Paper Placement Activities of Bankers Trust Company, dated June 4, 1985 at 4-5 (Pet. App. 76a, 79a-80a).

48 (Pet. App. 109a). In reaching this conclusion, the Board expressly rejected petitioner's contention that Bankers Trust's commencement of its commercial paper service in 1978 was evidence that Bankers Trust in earlier years had assumed this activity to be illegal:

[T]he fact that banks did not, until recently, act for issuers in the placement of commercial paper is not, in the Board's opinion, significant. The recent significant growth of the commercial paper market as a replacement for bank loans in meeting short-term funding needs has put new pressures on banks to seek supplemental income and to preserve existing customer relationships. Forbearance from a particular activity because, for example, of a lack of an economic incentive to provide it, should not be viewed in itself as persuasive evidence that the activity is unlawful.<sup>7</sup>

SIA moved in the district court for summary judgment declaring the Board Statement invalid as an incorrect interpretation of the Glass-Steagall Act. The Board, joined by Bankers Trust as intervenor, cross-moved for summary judgment seeking to uphold the Board's interpretation of the law based on the facts before the Board. The district court granted summary judgment for SIA, holding that the bank was engaged in "underwriting" and "distributing" securities prohibited by Section 21 of the Act. *Securities Indus. Ass'n v. Board of Governors*, 627 F. Supp. 695 (D.D.C. 1986) (Joyce Hens Green, J.) (Pet. App. 45a). Judge Green subsequently entered an injunction to prohibit Bankers Trust from continuing its service pending appeal. *Securities Indus. Ass'n v. Board of Governors*, 628 F. Supp. 1438 (D.D.C. 1986) (Pet. App. 35a).

On appeal by the Board and Bankers Trust, the court of appeals stayed the district court's injunction pending review. Order of the Court of Appeals (Feb. 28, 1986) (Pet. App. 33a). On December 23, 1986, a unanimous panel of the court of appeals (Judges Mikva, Edwards and Bork) in an opinion by Judge Bork reversed the district court and reinstated the decision of the Board. 807 F.2d 1052 (D.C. Cir. 1986) (Pet. App. 1a).

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<sup>7</sup> Board Statement at 20 (Pet. App. at 90a) (citations omitted).

## REASONS FOR DENYING THE WRIT

This Court remanded *Becker* for a determination of whether Bankers Trust's method of placing commercial paper constituted "underwriting," "distributing" or impermissible "selling" within the meaning of the Glass-Steagall Act. 468 U.S. at 160 n.12. In another case decided the same day as *Becker*, the Court held that a non-bank subsidiary of a bank holding company may, consistent with the Glass-Steagall Act, act as agent for customers in conducting a securities brokerage business that is limited to the purchase and sale of securities for the account of customers. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207 (1984) ("*Schwab*"); accord *Securities Indus. Ass'n v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 790 (1986) ("*Security Pacific*").<sup>8</sup>

On remand following *Becker*, the Board, informed by its expertise in banking and the banking laws, developed a factual record on the specific activities being conducted by Bankers Trust. The Board then scrutinized those activities in light of the language, legislative history and purposes of Sections 16 and 21 of the Glass-Steagall Act. Applying the Act to the undisputed facts, the Board concluded that the manner in which Bankers Trust places commercial paper is permitted by the Act. The court of appeals unanimously upheld the Board, finding that its interpretation of the statute was reasonable and entitled to judicial deference. This Court need not revisit Judge Bork's thoughtful consideration of these issues.

To support its present petition, SIA identifies no conflict among the circuits, for none exists. Rather SIA contends that the Board Statement and the decision of the court of appeals conflict with *Becker*. SIA's contention is plainly wrong; *Becker*

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<sup>8</sup> This Court denied review of the portion of *Security Pacific* upholding the bank's authority to conduct discount brokerage activities through a subsidiary, but did grant a writ of certiorari to review the court of appeals decision that the offices of the subsidiary were "branches" of the bank operating in violation of the McFadden Act. *Cert. granted sub nom. Clarke v. Securities Indus. Ass'n*, 106 S.Ct. 1259 (1986). This Court has recently ruled on the merits of the portion of the case it chose to review and held that the offices of the subsidiary were not "branches" under the McFadden Act. 107 S.Ct. 750 (1987).

expressly left open the issue that was determined on remand. SIA's additional assertion, that the decision of the court of appeals represents a sweeping change in the law, is also groundless. The decision below is based solely upon the facts specifically relating to the commercial paper placement activities of Bankers Trust. It represents merely an application of the principle, stated in *Schwab* and confirmed by *Security Pacific*, that the permission conferred on banks by Section 16 to act as agents for their customers in purchasing and selling securities "suggests that the activity was not the sort that concerned Congress in its effort to secure the Nation's banks from the risks of the securities market." *Schwab*, 468 U.S. at 221.

# I.

## IN ITS PRESENT POSTURE THIS CASE PRESENTS NO ISSUE OF NATIONAL SIGNIFICANCE THAT REQUIRES REVIEW BY THIS COURT

Petitioner suggests that this case is important because it permits "all 14,000 banks in the country" to market all kinds of securities in any manner they choose. Pet. 10. This suggestion is patently wrong; the decision below has no application to securities that are sold to the public, and its application to securities placed in a manner other than that employed by Bankers Trust in this case should be decided in a case presenting those facts. Nor is there anything novel about the idea that banks acting as agents for their customers may privately place commercial paper, when under *Schwab* and *Security Pacific* banks through their affiliates already purchase and sell securities for their millions of retail customers.

SIA's reference to "all 14,000 banks" across the country is a further exaggeration since, for practical business reasons, entry to the third-party commercial paper market is limited to a handful of large banks.<sup>9</sup>

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<sup>9</sup> SIA's suggestion in its Petition that Judge Bork's decision will result in 14,000 banks across the United States embarking upon a multitude of speculative securities activities conflicts with a statement by SIA's General Counsel, William Fitzpatrick, quoted in the *American Banker* of April 9, 1987 (pp. 1, 15). Mr. Fitzpatrick expressed doubts that "there are three state-chartered

(footnote continued on following page)

Those chiefly affected by this development (aside from the customers who benefit from more competition) are the elite group of investment bank dealers represented by SIA who have historically dominated the commercial paper market. Protection of their interests is not a goal of the Glass-Steagall Act and does not warrant intervention by this Court.

SIA also argues that the Board Statement represents an effort to "dismantle the Glass-Steagall Act through administrative 'interpretation'" that usurps a policy-making function that belongs to Congress. Pet. 12. While SIA correctly points out that nearly every session of Congress over the past ten years has considered "major legislative proposals that, if enacted, would materially alter the existing regulatory framework" (Pet. 11), SIA neglects to note that these proposals would have expressly conferred on banks the right to *underwrite* commercial paper.<sup>10</sup> At no time has Congress considered any proposal to bar banks from serving as commercial paper placement *agents* for their customers, even though Bankers Trust and other banks have in fact been placing commercial paper in this manner throughout

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nonmember banks in the country with the capital to do securities activities." Mr. Fitzpatrick was trying to minimize the significance of the recent decision of the United States Court of Appeals for the District of Columbia Circuit that upheld the authority of the Federal Deposit Insurance Corporation, against a challenge by SIA and its ally, Investment Company Institute, to permit state nonmember banks to conduct securities activities through subsidiaries under the Glass-Steagall Act. See *Investment Co. Inst. and Securities Indus. Ass'n v. FDIC*, Nos. 84-1616 and 85-5769, slip op. (D.C. Cir. Apr. 7, 1987).

SIA's pursuit of that case despite its conceded lack of practical significance can be compared to its continued pursuit of this case even after it ceased to present a legally significant issue. SIA's policy is indeed to challenge all bank securities activity even when it must admit that the activity is not significant; thus the *American Banker* of January 15, 1987 (p. 38) reports Mr. Fitzpatrick as commenting that this Court's decision in *Clarke v. Securities Industry Association*, 107 S. Ct. 750, "was not significant for us"—even though SIA had vigorously pursued that case too.

<sup>10</sup> The Financial Services Competitive Equity Act, S. 2851, 98th Cong., 2d Sess., 130 Cong. Rec. S. 11162-80 (daily ed. Sept. 13, 1984) (passed by the Senate on Sept. 13, 1984) would have permitted commercial banks to underwrite and deal in commercial paper on the same basis as investment banks. Another bill, the Financial Services Clarification Act, S. 716, 99th Cong., 1st Sess., 131 Cong. Rec. S. 3323-26 (daily ed. Mar. 20, 1985) (introduced Mar. 20, 1985) included the same provision regarding commercial paper as S. 2851.

the period. The inference properly drawn from the legislative proposals is either that Congress is content that banks be permitted to place commercial paper on an agency basis or it considers the issue appropriately left to the Board to resolve under existing law.

SIA also points to hearings held by the Board on February 3, 1987 to consider applications by Bankers Trust's parent holding company and two other bank holding companies to establish affiliates to underwrite and deal in commercial paper and three other types of securities.<sup>11</sup> After SIA's instant petition was filed, the Senate passed a bill that would bar the applicants from conducting activities pursuant to these applications if they are approved until March 1, 1988.<sup>12</sup> The Senate bill conspicuously omits, however, to attempt to take away from banks the power to place commercial paper on an agency basis in the manner that has been upheld by the Board and the court of appeals in this case. Once again, the proper inference is that the Senate does not view Judge Bork's decision as either violating the Glass-Steagall Act or invading Congressional powers, and sees no need to reverse that decision legislatively.

## II.

### THE FULLY ARTICULATED DETERMINATION OF THE BOARD IS RIGHT AND IS ENTITLED TO JUDICIAL DEFERENCE

The Board is the agency with primary responsibility for interpreting the Glass-Steagall Act with respect to state-chartered member banks and bank holding companies and their non-bank

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<sup>11</sup> The Board approved the applications, to a limited extent, by an order dated April 30, 1987. SIA has petitioned for review of the Board's approval order to the Court of Appeals for the Second Circuit, and Bankers Trust's parent company has also petitioned for review as to the limitations imposed by the Board's order. Argument of these petitions for review has been scheduled for the week of June 22, 1987.

<sup>12</sup> Competitive Equality Banking Act, S. 790, 100th Cong., 1st Sess., 133 Cong. Rec. S4061-81 (daily ed. Mar. 27, 1987) (passed by the Senate on Mar. 27, 1987).

subsidiaries.<sup>13</sup> Under this Court's decisions, a Board interpretation of the Act is to be accorded substantial deference when "its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Schwab*, 468 U.S. at 217; cf. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). What makes this case like *Schwab* and *Board of Governors v. Investment Company Institute*, 450 U.S. 46, 56 (1981) ("*ICI*"), in which deference was given to the Board's interpretation, and unlike *Becker* and *Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971) ("*Camp*"), in which deference was not given, is that the Board's rationale was fully articulated at the administrative level in terms of the language of the statute as well as its purposes and legislative history. When there is such a fully articulated rationale this Court under its own decisions should decline to intervene.

This Court declined to defer to the Board in *Becker* because the Board there had taken the position that commercial paper was not a "security" and consequently had not addressed at the administrative level the issue of whether Bankers Trust's activities posed the dangers the Glass-Steagall Act was intended to eliminate. In the Court's view, appellate counsel's arguments on this issue were of little moment because "[i]t is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Becker*, 468 U.S. at 143-44 (quoting from *Camp*, 401 U.S. at 628) (Pet. App. 123-24a). On remand the Board, as instructed by the Court, examined in exhaustive detail the language of the statute, the interrelation of its provisions, and their legislative history and purposes. Judge Bork's

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<sup>13</sup> Federal regulation of commercial banks is divided among three primary regulators. State chartered banks that choose to become members of the Federal Reserve System fall under the jurisdiction of the Board. See 12 U.S.C. §§ 221, 248 (1982). National banks come within the jurisdiction of the Comptroller of the Currency. *Id.* Insured state banks that are not members of the Federal Reserve System operate under the jurisdiction of the Federal Deposit Insurance Corporation. 12 U.S.C. §§ 1811, 1815 (1982). Finally, bank holding companies and their non-bank subsidiaries are regulated by the Board under the Bank Holding Company Act of 1956 regardless of the primary regulators of their subsidiary banks. 12 U.S.C. §§ 1841-1849.

decision specifically found that "the Board has comprehensively addressed the language, history, and purposes of the Act that bear on whether commercial banks should be able to place commercial paper." Pet. App. 7a. As the Court reasoned in *Schwab*, decided the same day as *Becker*, "deference is appropriate where, as here, the Board expressly addressed the application of the Glass-Steagall Act to the proposed regulatory action and determined that the proposed action implicated none of the concerns that led to the enactment of the Act." 468 U.S. at 271 n.16.

If the concept of judicial deference to administrative expertise is to have real rather than token meaning, then deference must be accorded to the Board's determination in this case.

### III.

#### THE DECISION OF THE COURT OF APPEALS AND THE BOARD'S DETERMINATION ARE IN HARMONY WITH *BECKER*, *SCHWAB* AND OTHER AUTHORITIES INTERPRETING THE GLASS-STEAGALL ACT

SIA argues that the same considerations that led the Court in *Becker* to conclude that commercial paper is a "security" for Glass-Steagall Act purposes compel the further conclusion that Bankers Trust's placement of commercial paper in any manner whatever is forbidden by the Act. Far from compelling that conclusion, however, this Court remanded *Becker* so that the remaining issues could be determined exactly in the manner that was in fact followed: the Board, informed by its administrative expertise, first established the facts regarding Bankers Trust's activity, and then interpreted the law as applied to those facts. The result is not inconsistent with *Becker*; it is a logical consequence of that decision.

Since *Becker* held that commercial paper is a "security" for the purposes of the Glass-Steagall Act, Bankers Trust can place commercial paper consistent with Section 16 if it does not underwrite the paper and if it places the paper within the

confines of Section 16's "permissive phrase."<sup>14</sup> As the Board found, Bankers Trust's commercial paper placement service is structured to meet the requirements of the "permissive phrase" and it does. Even the district court agreed that Bankers Trust's activities "fit neatly within the literal language of Section 16's permissive phrase." 627 F. Supp. at 701 (Pet. App. 56a). Thus the Board, the district court and the court of appeals were unanimous in agreeing that Bankers Trust is "selling" commercial paper in the manner authorized by the "permissive phrase" of Section 16.

Moreover, *Schwab* and *Security Pacific* settled in the affirmative the issue of whether the "permissive phrase" should be given effect in accordance with its plain meaning. Those decisions thus disposed of the argument advanced by SIA, and endorsed by the district court, that the "permissive phrase" should be read into insignificance because its plain meaning is inconsistent with Congress's supposed legislative purpose to separate completely commercial from investment banking. Both *Schwab* and *Security Pacific* declare the principle that the Glass-Steagall Act's "flat prohibitions" do not extend to those securities activities that Congress expressly permitted in Section 16. This Court's decision in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986), further emphasizes that the plain meaning is not to be read out of the words of a statute in the name of achieving some "broad legislative purpose."

Having agreed with the Board that Bankers Trust's "selling" of commercial paper is permitted by Section 16, the court of appeals then upheld the reasonableness of the Board's further conclusion that this permitted "selling" is also not "underwriting" prohibited in Section 16. Here again the court's analysis,

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<sup>14</sup> Section 16, 12 U.S.C. § 24 (Seventh) (1982 and Supp. II 1984), provides in pertinent part:

The business of dealing in securities and stock by [a bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities or stock. . . .

following the Board, is fully consistent with both *Becker* and *Schwab*.

Noting the undeniable fact that both the Glass-Steagall Act and its legislative history are "barren of any definition of the term 'underwriting,'" the court turned for guidance—just as this Court did in *Becker* when it searched for the meaning of the term "securities" in the Glass-Steagall Act, 468 U.S. at 149-50 (Pet. App. 130-31a)—to the language and legislative history of the nearly-contemporaneous federal securities laws. The court of appeals concluded:

[w]hile by no means conclusive, this history supports the reasonableness of the Board's view that Congress understood "underwriting" (and for that matter, "distribution") of securities to connote a public offering, and that the private offerings of commercial paper effected by Bankers Trust do not come under the Glass-Steagall Act's meaning of "underwriting."

807 F.2d at 1064 (Pet. App. 21a).<sup>15</sup>

The conclusion that underwriting can occur only in the context of a public offering is fully consistent with *Schwab*, where the Court described both "underwriting" and "distributing" as taking place in a *public* offering of securities, explaining clearly that:

In the typical distribution of securities, an underwriter purchases securities from an issuer, frequently in association with other underwriters. The distribution of these

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<sup>15</sup> Professor Louis Loss has written:

A person who purchases securities from an issuer with a view to *investment* is not an "underwriter" under the first part of the definition. Nor is a person an underwriter who buys securities from an issuer with a view to reoffering them to a small number of persons for investment, or who on the issuer's behalf sells securities to a small number of persons for investment. There must be a contemplated "distribution"—a term which the Commission regards as more or less synonymous with "public offering."

1 L. Loss, *Securities Regulation* 551 (2d ed. 1961) (emphasis in original). See also H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) ("The Commission has recognized by its interpretations that a public offering is necessary for a distribution. Therefore there can be no underwriter within the meaning of the Act in the absence of a public seller . . .").

securities to the public may be effected by the underwriters alone, or in conjunction with a group of dealers who also purchase and sell the particular issue as principals.

468 U.S. at 217-18 n.17. This Court's usage of the terms "underwriting" and "distribution" to refer to a *public* offering comports with the meaning universally accorded to them, in the securities law context.<sup>16</sup>

In addition to concluding that Bankers Trust's commercial paper placement activity is "selling" in the manner permitted by Section 16 and is not "underwriting" forbidden by that section, the Board and the court of appeals each determined that since the activity is authorized by Section 16, it is not forbidden by Section 21. This bit of common sense is also a direct application of *Becker* ("§ 16 and § 21 seek to draw the same line," 468 U.S. at 149 (Pet. App. 129a)). See also *ICI*, 450 U.S. at 63. As the court of appeals said, "[i]f Section 21 prohibited what Section 16 explicitly permits, Section 21 would render Section 16's permissive language entirely nugatory—an absurd result." 807 F.2d at 1058. (Pet. App. 10a). In any event, it continued, "the sweeping and comprehensive language employed [in the 1935 amendments to Section 21] explicitly provides that any restriction on the activities of a commercial bank that may arise because of the prohibition of Section 21 is relieved insofar as the activity is permitted by Section 16. This unambiguous language controls our reading of the statute." *Id.*

Finally, in *Becker* this Court delineated the "subtle hazards that arise when a commercial bank goes beyond the business of acting as a fiduciary or managing agent and enters the investment banking business." *Becker*, 468 U.S. at 145 (quoting from *Camp*, 401 U.S. at 630). That line may be crossed, according to

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<sup>16</sup> Noting that "[a] 'best efforts' distribution is not technically an underwriting," this Court in *Schwab* did "not consider whether a 'best efforts' distribution is prohibited by Section 20." 468 U.S. at 217-18 n.17. Following this Court's lead, neither the Board nor the court of appeals, once satisfied that an "underwriting" cannot take place without a public offering, decided the further question of whether Bankers Trust's placement of commercial paper on a purely agency basis would otherwise constitute "underwriting" for Glass-Steagall Act purposes.

*Schwab*, when a bank acts as a *principal* in securities transactions: “[a]ll these ‘subtle hazards’ are attributable to the promotional pressures that arise from . . . entities that purchase and sell particular investments on their own account.” 468 U.S. at 220 n.23. Where, as here and in *Schwab*, a bank carefully restricts itself to acting as its customers’ *agent* within the confines of Section 16’s “permissive phrase” and not as a principal, the Congressional concerns underlying the Glass-Steagall Act are not implicated. Although in *Becker* this Court spoke repeatedly of the dangers that could arise from commercial bank *underwriting* activity, it nowhere suggested that those same concerns would bar an activity that does not constitute “underwriting”.<sup>17</sup> The Board’s determination on remand that Bankers Trust’s method of placing commercial paper does not cross the line into the forbidden territory of “investment banking” thus is fully consistent with this Court’s prior rulings and is entitled to full judicial deference.

In short, both the Board and the court of appeals, in finding that Bankers Trust’s commercial paper placement service is permitted by Section 16 and is not prohibited by Section 21, did no more than give effect to the words of the statute interpreted in light of its legislative history and purposes consistent with this Court’s decisions in both *Becker* and *Schwab*.

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<sup>17</sup> “Bankers Trust may not *underwrite* commercial paper if commercial paper is a ‘security’ . . .” *Becker*, 468 U.S. at 148 (emphasis added) (Pet. App. 128a). The Court also said that “[underwriting] places a commercial bank in the role of an investment banker, which is precisely what Congress sought to prohibit in the Act.” *Id.* at 158 (Pet. App. 138a).

**CONCLUSION**

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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# **APPENDIX**



**APPENDIX**

Pursuant to Rule 28.1 of this Court, the parent corporation, subsidiaries (other than wholly owned subsidiaries) and affiliates of respondent Bankers Trust are identified as follows:

**Parent:**

Bankers Trust New York Corporation

**Subsidiaries and Affiliates:**

Bankers Trust Company of California, N.A.

Bankers Trust Company of Florida, N.A.

Bankers Trust (Delaware)

BT Brokerage Corporation

BT Capital Corporation

BT Commercial Corporation

BT Equipment Leasing, Inc.

BT Futures Corp.

BT International Trading Incorporation

BT Investment Managers Inc.

BT Private Clients Corp.

BT Securities Corporation

Private Clients Group Inc.